



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 22, 2005

Mr. Marc Barenblat  
Staff Attorney  
State Board for Educator Certification  
1701 N. Congress Ave. 5<sup>th</sup> Floor  
Austin, Texas 78701

OR2005-05524

Dear Mr. Barenblat:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 226703.

The State Board for Educator Certification (the "board") received a request for information pertaining to the denial of the requestor's application for Texas probationary certification. You inform us that the board will release some of the requested information. You claim that other responsive information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.130, and 552.1325 of the Government Code. You also contend that some of the responsive information is not subject to disclosure under the Act. We have considered your arguments and have reviewed the information you submitted.<sup>1</sup>

Initially, we address your contention that some of the submitted information is not subject to the Act. The Act defines "public information" as consisting of "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business . . . by a governmental body" or "for a governmental body and the governmental body owns the information or has a right of access to it." Gov't Code § 552.002(a). Although the Act's definition of "governmental body" is broad, it specifically excludes "the judiciary." *See id.* § 552.003(1)(B); Open Records Decision No. 646 (1996).

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<sup>1</sup>This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the board to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Thus, the Act is not applicable to judicial records. *See also Benavides v. Lee*, 665 S.W.2d 151 (Tex. App.—San Antonio 1983, no writ); Attorney General Opinion DM-166 (1992); Open Records Decision No. 618 at 4 (1993). You assert that the information submitted as Exhibit C is not subject to the Act because it is maintained by a court.

We note, however, that the board received the present request for information. Furthermore, it appears to this office that the information in Exhibit C is held by the board in connection with the transaction of the board's official business. Information that a governmental body holds for its own purposes is not excluded from the scope of the Act merely because the same information may also be held by a court. *Cf.* Gov't Code § 552.022(a)(17) (providing for required public disclosure of information that is also contained in a public court record). The board is not itself part of the judiciary, and you do not inform us that the board holds the information in Exhibit C on behalf of the judiciary. Accordingly, we find that Exhibit C is subject to the Act and may be withheld only if an exception to disclosure is shown to be applicable to that information. As the board does not claim an exception to the disclosure of Exhibit C, that information must be released.

You seek to withhold the rest of the submitted information under section 552.103 of the Government Code. This exception provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. — Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. — Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.). Both elements of the

test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990) *Id.*

To establish that litigation is reasonably anticipated for purposes of section 552.103, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is “reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986).

You state that the requestor has informed the board that she will be appealing a denial of her application for Texas probationary certification and requesting a hearing. You also state that an appeal of an administrative denial is a contested case under the Administrative Procedure Act, chapter 2001 of the Government Code.<sup>2</sup> You explain that the board is responsible for docketing the case. You assert that litigation thus was reasonably anticipated when the board received this request for information. You also assert that the information submitted as Exhibits D and E relates to the anticipated litigation. Having considered your arguments, we conclude that you have demonstrated that section 552.103 of the Government Code is generally applicable to Exhibits D and E.

We note, however, that one of the documents in Exhibit D is a letter to the board from the opposing party in the anticipated litigation. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information that relates to anticipated litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, the opposing party’s letter to the board may not be withheld under section 552.103. With the exception of that document, the board may withhold the information in Exhibits D and E at this time under section 552.103. We note that the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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<sup>2</sup>We note that a contested case under the APA constitutes litigation for purposes of section 552.103 of the Government Code. *See* Open Records Decision No. 588 at 7 (1991) (contested case under statutory predecessor to APA constitutes litigation for purposes of statutory predecessor to Gov’t Code § 552.103).

With respect to the document that is not excepted from disclosure under section 552.103, you also claim section 552.111 of the Government Code. This section excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. You assert the attorney work product privilege under this exception. Section 552.111 encompasses the attorney work product privilege found in rule 192.5 of the Texas Rules of Civil Procedure. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002).

Rule 192.5 defines work product as

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body that seeks to withhold information under rule 192.5 bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.*; Open Records Decision No. 677 at 6-8 (2002). In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that

(a) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat’l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; Open Records Decision No. 677 at 7.

You assert that the opposing party’s letter to the board is attorney work product. We find, however, that you have not established that this document constitutes material prepared or mental impressions developed in anticipation of litigation or for trial by or for the board or the board’s representatives. Likewise, you have not shown that this document is a

communication made in anticipation of litigation or for trial between the board and the board's representatives or among the board's representatives. We therefore conclude that the board may not withhold the opposing party's letter as attorney work product under section 552.111 of the Government Code.

In summary: (1) the board must release the information in Exhibit C; (2) except for the opposing party's letter to the board, the information in Exhibits D and E is excepted from disclosure at this time under section 552.103 of the Government Code; and (3) the requestor's letter to the board is not excepted from disclosure under section 552.103 or section 552.111 of the Government Code and must also be released.<sup>3</sup> As we are able to make these determinations, we need not address your other arguments against disclosure.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll

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<sup>3</sup>We note that Exhibit C contains information that the board would be required to withhold from the public under section 552.101 to protect the requestor's privacy interests. In this instance, however, the requestor has a special right of access to this information, and it may not be withheld from her under section 552.101 on privacy grounds. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Should the board receive a request for this information from a person who would not have a right of access to it, the board should resubmit this same information and request another decision. *See* Gov't Code §§ 552.301(a), 302; Open Records Decision No. 673 (2001).

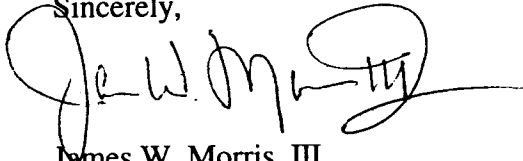
free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. W. Morris, III', with a long horizontal flourish extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/krl

Ref: ID# 226703

Enc: Submitted documents

c: Ms. Jessica A. Cooper  
16013 Stoneham Circle  
Pflugerville, Texas 78660  
(w/o enclosures)